Office-Supreme Court, U.S.
FILED
JUN 20 1981
ALEXANDER L. STEVAS,
CLERK

NO. 80-1604

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SPOKANE ARCADES, INC., A Washington Corp.;
PLAYTIME THEATRES, INC., A Washington Corp.;
J-R DISTRIBUTORS, INC., A Washington Corp.; and
SPORTLAND AMUSEMENT, INC., A Washington Corp.;
Plaintiffs-Appellees,

vs.

DONALD C. BROCKETT,
Prosecuting Attorney in his representative capacity only;
Defendant-Appellant.

MOTION TO AFFIRM

ON APPEAL FROM THE NINTH CIRCUIT
COURT OF APPEALS

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I

GROUNDS FOR AFFIRMATION

The judgment of the United States Court of Appeals for the Ninth Circuit, 631 F.2d. 135 (July 10, 1980) for which review is sought by the jurisdiction statement filed by Donald Brockett, Prosecuting Attorney in his capacity only as a prosecutor for Spokane County, State of Washington, should be affirmed, pursuant to *Rule 16* of the *Rules of the Supreme Court of the United States* for the following reasons:

1. Donald Brockett, an individual prosecutor, has not been joined in his appeal by the necessary and indispensable parties to wit: representatives of the State of Washington, who after the ruling and order by the Ninth Circuit have accepted said ruling which relates to a statute of statewide application and are being governed accordingly. Brockett, during the pendency of the appeal in the Ninth Circuit on two (2) separate occasions sought relief in this Court pursuant to *Rule 18* alleging that "the case is os such imperative importance as to justify the deviation from normal appellate practices and to require immediate settlement in this Court." On both occasions the Petition from Writ of Certiorari was denied. Because of the lack of the necessary and irresponsible party (i.e. the Attorney General of the State of Washington who has abandoned further appeals) the judgement should be affirmed.

2. Appellant, Brockett, a local county prosecutor, in his jurisdictional statement filed in this Court, has failed to disclose by his "initial pleading, motion or paper" filed in the Supreme Court does not disclose or recite that 28 U.S.C. §2403(B) may be applicable and that copies of such recitation were affirmatively served on the Attorney General of the State of Washington as required by *Rule 28* of the Rules of this Court, and accordingly the judgment below should be affirmed per Rule 16.1(d) of the Rules of this Court.

3. That the issues presented by the jurisdictional statement in light of the holding of this Court in *Vanoe v. Universal Amusements Co.*, 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980) are so insubstantial as not to need further argument per Rule 16.1(c) of the Rules of this Court.

4. That the issues presented by the jurisdiction statement were correctly dealt with by both the trial court in 449 F.Sup. 1145 (E.D. Wash. 1978) and by the Ninth Circuit in 631 F.2d. 135, and as such, the same are so insubstantial as not to need further argument per Rule 16.1.1(c) of the Rules of this Court.

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below are listed in the caption. The only corporation of those listed which is affiliated, is Playtime Theatres, Inc.; its affiliated is Kuhio Bay Properties, Inc., a Washington Corporation.

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II.

COUNSEL FOR PLAINTIFFS-APPELLEES HAVE NO ARGUMENT WITH THE RECITATION OF APPELLANT BROCKETT AS TO: *OPINIONS BELOW* *JURISDICTION* *STATUTORY PROVISIONS INVOLVED*

Counsel for Plaintiffs-Appellees do quarrel with certain aspects of the *STATEMENT OF THE CASE* as set forth by Appellant Brockett.

While it is true that a complaint was filed prior to the time period for certification with a request for a temporary restraining order with notice, the latter was denied and the initative was duly certified into law.

Judge Fitzgerald heard the Application for Preliminary and Permanent Injunction after the challenged statute was in full force and effect.

During oral argument, the Court inquired of Appellant Brockett if he intended to invoke the statute against the plaintiff in the absence of the pendency of the lawsuit to which he replied with an emphatic and vigorous "affirmative", the representative of the office of the Attorney General also assured the Court that their office would also seek to support the law and enforce it vigorously. For this reason, the Court concluded on the standing issue 449 F.Supp., *supra* at 1148, "it is to be expected that the State Attorney General and the county prosecutors at Washington will faithfully and energetically perform their duties under the law."

The balance of appellant *Brockett's Statement of the Case* is unchallenged as to accuracy.

III

THE STATEMENT OF REASONS FOR PLENARY REVISION HAVE BEEN FULLY CONSIDERED BY BOTH THE TRIAL COURT AND THE CIRCUIT COURT AND NEED NOT FURTHER TROUBLE THIS COURT AND THIS CASE SHOULD BE SUMMARILY DISPOSED OF UPON THE MERITS PURSUANT TO RULE 16.7 OF THE RULES OF THIS COURT.

A.

WHETHER A FEDERAL COURT SHOULD ABSTAIN FROM DECIDING THAT A STATE STATUTE IS UNCONSTITUTIONAL ON ITS FACE PRIOR TO ANY ACTUAL CASE OR CONTROVERSY EXISTING IN WHICH A STATE COURT HAS HAD THE ABILITY TO AUTHORITATIVELY CONSTRUE THE STATUTE AND WHERE NO SHOWING HAS BEEN MADE THAT STATE PROCEDURE IS INADEQUATE IN THEORY OR PRACTICE?

This argument was made and briefed to the trial judge and answered by him in 449 F.Supp. 1145 at pages 1149 to 1150, inclusive in the negative.

This argument was made and briefed to the three (3) judge appellate panel and unanimously answered by them at 6631 F.2d. 135 and page 137, again in the negative.

The Seventh Circuit in a case decided September 23, 1980 stated *Entertainment Concepts, Inc. v. Maciejewski, et al.*, 631 F.2d 497 held on the "case or controversy" question when dealing with issues within the penumbra of the First Amendment in pertinent part as follows:

"The concept of ripeness is founded in the constitutional requirement that there must be a 'case or controversy' before courts can act. That controversy must not be merely speculative; rather, it must be a concrete dispute between the parties "in order to avoid overstatement [and] to focus attention on a narrow problem.' Currie, Federal Courts 91 (1975).

"The requirement of concreteness, however, does not in and of itself require that the plaintiff be the subject of some administrative or judicial proceeding at the time of suit. The Supreme Court has often upheld the grant of injunctive relief against laws before prosecution. *See, e.g., Doe v. Bolton*, 410 U.S. 179, 188, 93 S.Ct. 739, 745, 35 L.Ed.2d 201 (1973) (pregnant woman and doctors allowed to challenge an anti-abortion law); *Eperson v. Arkansas*, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968) (no criminal charges pending against school teacher attacking anti-evolution statute). Plaintiff is the only movie theatre in Westmont. The Village Board of Trustees amended the zoning ordinance one week after the theatre began advertising 'adult movies coming soon.' Similarly, the Board of Trustees amended the licensing revocation ordinance during the pendency of this suit. Even though it has not specifically threatened plaintiff with prosecution, the Village's conduct indicates more than a broad policy that it will enforce the laws generally. *See Poe v. Ullman*, 367 U.S. 497, 501, 81 S.Ct. 1752, 1754, 6 L.Ed.2d 989 (1961). Plaintiff can reasonably assert that in fears enforcement of these two ordinances for specific conduct on its part. 'Under such circumstances, this Court does not feel it "necessary

that [plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge a statute he claims deters the exercise of his constitutional rights."' *Natco Theatres v. Ratner*, 463 F.Supp. 1124, 1127 (S.D.N.Y. 1979), quoting *Steffel v. Thompson*, 415 U.S. 452, 459, 94 S.Ct. 1209, 1215, 39 L.Ed.2d 505 (1974). See *Craig v. Boren*, 429 U.S. 190, 194, 97 S.Ct. 451, 455, 50 L.Ed.2d 397 (1976)."

"Plaintiff also alleges that the vagueness of the ordinance makes it uncertain whether the adult movie zoing ordinance applies to it at all; if is does apply, plaintiff attacks the ordinance's lack of standards. 'In the area of freedom of expression it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office, whether or not he applied for a license.' *Freedman v. Maryland*, 380 U.S. 51, 56, 85 S.Ct. 734, 737, 13 L.Ed.2d 649 (1965). Similarly, no film of plaintiff has been declared obscenne. But plaintiff need not seek closure of its theatre in order to activate judicial review. Plaintiff alleges 'infringement of a constitutional right by the administrative process itself.' *Moore v. East Cleveland*, 431 U.S. 494, 528 n.3, 97 S.Ct. 1932, 1950, 52 L.Ed.2d 531 (1977) (Burger, C.J., dissenting); *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980). Such a 'broadside attack' presents a justiciable controversy. See *Times Film Corp. v. Chicago*, 365 U.S.43, 50, 81 S.Ct. 391, 395, 5 L.Ed. 403 (1963).

We conclude that plaintiff's case is ripe for resolution at this time."

In the recent case out of the Ninth Circuit, *Western Mining Counsel, et. al. v. Watt* (as Secretary of Interior) 643 F.2d 618 (April 23, 1981) the Court required only that:

1. Case or controversy requirement for Federal Court jurisdiction demand first that issues be justiciable and that plaintiffs having standing to assert their claims; and that
2. Standing requires as a constitutional minimum that plaintiffs alleged such personal stake in the outcome of controversy as to assure that concrete adversity which sharpens presentation of issues upon which court so largely depends for illumination of difficult constituional questions.

This Court in *U.S. Parole Commissions, et. al. v. Geragny*, _____ U.S. _____ S.Ct. 1202 held in essence that justiciability under Article III of the Federal Constitution case or controversey requirement is neither a legal concept with a fixed content not susceptible of scientific verification.

Further this Court in *Babbitt v. United Farmworkers Nat. Union*, _____ U.S. _____ 99 S.Ct. 2301 (1979) deal with the issue of case or controversy requirement and ruled that the difference between an "abstract question" and a "case or controversy" is one of degree and is not discernible by any precise test; and no basic inquiry is whether conflicting contentionns of the parties present a real, substantial controversy between parties' having adverse legal interests, a dispute, definite and conrete, not hypothetical or abstract. *U.S. Const. Art. 3. S.1 et seq.*

This Court in *Babbitt, supra,* went on to hold that a plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement, but one need not await consummation of threatened injury to obtain prevented relief, for if injury is certainly impending that is enough, relying on U.S. Const. Art. 3., 5.1 et seq.

Predicated on the undisputed facts before the trial judge in the case at bar, those facts as considered by the Appellate Court in the case at Bar, and the appropriate jurisprudence part of which is referred to honoring this reason for granting plenary review as urged on the Court by Appellant Brockett is insubstantial and the judgment below should be summarily affirmed.

B

WHETHER OR NOT THE NINTH CIRCUIT MISREAD AND THUS MISAPPLIED *VANCE v. UNIVERSAL AMUSEMENT CO., INC.*, 63 L.Ed.2d 413 (1980) SO AS TO HOLD INITIATIVE NO. 335 (NOW CODIFIED AS REVISED CODE OF WASHINGTON 7.48.050-100, 900) UNCONSTITUTIONAL ON ITS FACE AS A PRIOR RESTRAINT ON PROTECTED MATERIAL UNDER THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION?

The argument is made by Brockett that no "prior restraint" is implicated in the Washington Statutory Scheme challenge herein and *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308, 63 L.Ed.2d 413,100 S.Ct. 1156 is not controlling.

Strong language from an Appellant, who on two (2) separate occasions filed Extraordinary Petitions for Certiorari with this Court pending appeal in the Ninth Circuit, and asking on both occasions to be joined as party in the *Vance* case because of the similarity of issues.

An adverse opinion in *Vance* and *ergo*, Appellant Brockett seeks to disassociate himself and his cause with the *Vance* case, but consistency of position has never been considered the matriarch of the adversary relationship.

The trial judge considering the concept of prior restriant in 1978 without the benefit of this Court's ruling in *Vance v. Universal Amusements Co., Inc.*, 445 U.S. 308 (1980) hold that the challenged statute would permit a prohibited "prior restraint" — 449 F. Supp. at pages 1152 through 1157, the contents of which are incorporated herein by reference.

The Ninth Circuit, with the benefit of this Court's ruling in *Vance* analyzed the same in term of the challenged Washington statute and ruled that an "invalid prior restraint" could be imposed under the statutory scheme in question. See 631 F.2d at 138, and thus held it unconstitutional.

C

WHETHER OR NOT A DISTRICT COURT SHOULD BE FORECLOSED FROM DECIDING A MATTER DIFFERENTLY FROM THE DECISION OF THE UNITED STATES SUPREME COURT INVOLVING A SIMILAR STATUTE, WHEREIN THIS COURT DISMISSED AN APPEAL FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION?

Appellant Brockett continues to insist in this Court as he did in the District Court, the Appellate Court and now again in this

Court that the dismissal for want of a substantial federal question by this Court in *Art Theatre Guild, Inc., et al. v. Ewing*, 421 U.S. 923, 44 L.Ed. 82, 95 S.Ct. 1649 (1975) and the rationale thereon was controlling on all inferior courts under the doctrine of *Hicks v. Miranda*, 422 U.S. 332; 45 L.Ed. 223, 95 S.Ct. 2281 (1975).

The District Court in the case dealt in its opinion with this issue as follows; 449 F.Supp. at 1150-1151 and concluded that, " . . . the constitutionality of initiating 335 is not foreclosed by prior authoritative decisions of the United States Supreme Court."

The Ninth Circuit felt no compelling need to discuss the *Art Theatre Guild, Inc., et al. v. Ewing*, 421 U.S. 923 concept in light of *Hicks v. Miranda*, 422 U.S. 332, because as the teaching of Hicks makes abundantly clear, the lower courts are bound by summary decisions of the Supreme Court until such time as the Court informs them they are not. Hence the decision of the Court in *Vance* made moot any claimed precedential value of the *Art Theatre Guild, Inc., et al.* case, *supra*.

Further, it is clear that the doctrine regarding precedential value to be accorded summary dispositions first set forth in *Hicks v. Miranda, supra*, has been somewhat eroded over the passage of time, or perhaps further refined in the crucible of controversy.

In *Turner Elkhorn Mining Co., et al. v. Usery, 428 U.S.* _____, 96 S.Ct. 2882 (1976). The Court added a gloss to the *Hicks* doctrine which held in essence that the Supreme Court's summary affirmance in a prior case did not foreclose the District Court's determination of unconstitutionality regarding issues which were not before the Supreme Court on prior appeal.

This Court went on to hold that although several questions presented had been raised and decided in prior cases which had been disposed of by summary affirmance, Supreme Court having heard questions raised, would proceed to face them more fully.

In 1977, in the case of *Mandell v. Bradley*, 432 U.S. 173, 99 S.Ct. 2238, the Court held in pertinent part on this issue as follows:

> "The three-judge court in this case viewed this Court's summary affirmance in Salera as controlling precedent for the proposition that early filing dates, such as that employed in Maryland, are unconstitutionally burdensome on the independent candidate's access to the ballot, and therefore decided in favor of the appellees. We noted probable jurisdiction, 429 U.S. 813, 97 S.Ct. 52, 50 L.Ed.2d 73 (1976).
>
> The District Court erred in beliving that our affirmance in Salera adopted the reasoning as well as the judgment of the three-judge court in that case and thus required the District Court to conclude that the early filing date is impermissibly burdensome. *Hicks v. Miranda*, 422 U.S. 332, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975), held that lower courts are bound by summary actions on the merits by this Court, but we noted that "ascertaining the reach and content of summary actions may itself present issues of real substance". Id., at 345 n. 14, 95 S.Ct., at 2290. Because a summary affirmance is an affirmance of the judgment only, the rationale of the affirmance may not be gleaned solely from the opinion below.

"When we summarily affirm, without opinion . . . we affirm the judgment *but not necessarily the reasoning by which it was reached. An unexplicated summary affirmance settles the issues for the parties, and is not to be red as a renunciation by this Court of doctrines previously announced in our opinions after full argument.*"; *Fusari v. Steinberg*, 419 U.S. 379, 391-392, 95 S.Ct. 533, 541, 42L.Ed.2d 521 (concurring opinion of THE CHIEF JUSTICE).

Summary affirmances and dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from. They do prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions. After Salera, for example, other courts were not free to conclude that the Pennsylvania provision invalidated was nevertheless constitutional. Summary actions, however, including Salera, should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved.

Here, the District Court ruled that legally, 'Salera decides the issue before us, and the latest expression of the Supreme Court, we are bound to follow it.' J.S. 12a. The precedential significance of the summary action in Salera, however, is to be assessed in the light of all of the facts in that case; and it is immediately aparent that those facts are very different from the facts of this case. There, in addition to the early filing date, signatures had to be gathered within a 21-day period. This limited time enormously

increased the difficulty of obtaining the number of signatures necessary to qualify as an independent candidate."[1]

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[1] "Because of its preoccupation with Salera, the District Court failed to undertake an independent examination of the merits."

In a case out of the Fifth Circuit, interpreting the impact of *Hicks v. Miranda, supra.* summary dispositions, in *Graham v. Wright* 525 F.2d 909 (1976), the Court at footnote 9 observed:

> "FN9. While the Supreme Court has held that lower courts are bound by summary decisions of the Supreme Court until that Court informs them otherwise, *Hicks v. Miranda*, 422 U.S. 332, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975), we believe that Hicks can be readily distinguished from the present case. In *Hicks*, the Supreme Court was dealing with the precedential value of a dismissal for want of a substantial federal question; in it sholding that such a dismissal carried the same impact as a dispositon on the merits, the Court was countering the argument that the precedential value of a dismissal was equivalent only to that of a denial of certiorari. The Court's holding certainly cannot be interpreted to mean that a summary affirmance by the Supreme Court of a lower court judgment is binding on questions not presented to that Court on appeal. See, *Swarb v. Lennox*, 405 U.S. 191, 92 S.Ct. 767, 31 L.Ed.2d 138 (1972) (Supreme Court's affirmance of District Court judgment insofar as it refused to declare a state's statute unconstitutional does not constitute approval of other aspects and details not

before Supreme Court where no cross appeal taken by defendant)."

The Third Circuit in dealing with the *Hicks* rationale in *Super Tire Engineering Co., et al. v. McCorkle*, 550 F.2d 903 (1977) in part as follows:

> "*Hicks v. Miranda*, 422 U.S. 332, 344, 95 S.Ct. 2281, 2289, 45 L.Ed.2d 223 (1975) teaches that votes 'to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case.' (quoting Ohio ex rel. *Eaton v. Price*, 360 U.S.246, 247, 79 S.Ct. 978, 3 L.Ed.2d 1200 (1959)). Of course, in such cases of summary adjudication, it is not always crystal clear what exactly was adjudicated by the Supreme Court."

See also, *Bickham v. Cashoff*, 620 F.2d 1238 (CA. 7 1980) criticizing the *Hicks* rationale.

For an lucid explanation of the *Hicks* rationale and its continual refinement and consequential limitations we read from the Third Circuit cases of *Lecates* et al. *Justice of the Peace Court No. 4 of the State of Delaware, et. al.* 637 F.2d 898 (1980) as follows:

> "It is necessary to determine at the outset of our analysis whether we are precluded from examing the merits of Lecates' contentions by virtue of the doctrine of *Hicks v. Miranda*, 422 U.S. 332, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975). In *Hicks* the Supreme Court admonished that, absent supervening doctrinal developments, a summary affirmance or dismissal for want of a substantial federal question must be regarded as a disposition on the merits. The

rationale for treating them as such is that the Supreme Court's jurdisdiction over appeals from state courts is obligatory, and the Court therefore has no discretion to decline adjudicating the merits. Id. at 344, 95 S.Ct. at 2289. Justice White, writing for the Court, indicated, however, that lower courts would be bound only to the extent that the issues in the previous case were sufficiently the same to warrant treating it as a controlling precedent. He recognized further that ascertaining the content of summary dispositions would be no easy task.

From its inception, the rule of construction announced in *Hicks v. Miranda* appeared somewhat vulnerable, as criticism both from within the Court and from 'scholarly commentators' was forcefully expressed.[6] Justice Brennan argued that summary dispositions should not be accorded conclusive weight, because in practice such dispositions frequently received little more reasoned consideration than certiorari denials.[7] He, along with Chief Justice Burger, suggested that summary dispositions should be treated as affirmances only of the judgment, and not the reasoning of the lower court.[8] As the Supreme Court grappled with applying Hicks and ascertaining the implicit reach of summary dispositions, it began to qualify, by way of explaining, its strict edict that summary dispositions are completely conclusive of similar cases.[9] In *Mandel v. Bradley*, 432 U.S. 173, 97 S.Ct. 2238, 53 L.Ed.2d 199 (1977), the full Court finally embraced the position that had been advanced by Chief Justice Burger and Justice Brennan, and held that summary affirmances approve the result, but not necessarily the reasoning, of the decision under appeal. The Court instructed lower courts (1) to scrutinize the particular

facts and the jurisdictional statement of a case that was summarily disposed of to determine the "precise issues presented and necessarily decided" by the summary action, and (2) to give conclusive effect only to these narrow questions. Id. at 176, 97 S.Ct. at 240.[10]

"Doubts remained, however, whether issues "necessarily decided" included arguments that could be inferred from a petitioner's more explicit contentions. These doubts were resolved in *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979), in which the Court expanded *Mandel*, and made it clear that lower courts have leeway to consider the merits of cases within the confines of the Hicks doctrine. Specifically, Justice Marshall held that lower courts are foreclosed from re-examining only the exact queston formally made part of the jurisdictional statement in a case receiving summary treatment; no opinion on the merits of issues that "merely lurk in the record" may be inferred from a summary disposition. Id. at 182-83."

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[6] See, e.g., Comment, the Precedential Weight of a Dismissal by the Supreme Court for Want of a Substantial Federal Question: Some implications of *Hicks v. Miranda*, 76 Colum.L.Rev. 508 (1976), counseling lower courts to examine the precise questions presented to avoid giving summary affirmances a scope beyond that necessitated by the actual facts of the cases. This suggestion has now prevailed with the Supreme Court. See pp. 903-904 infra.

[7] *Siddle v. Majors*, 429 U.S. 945, 97 S.Ct. 366, 50 L.Ed.2d 316 (1976).
(Brennan and Marshall, JJ., dissenting from denial of certiorari); *Colorado Springs Amusements, Ltd. v. Rizzo*, 428 U.S. 913, 96 S.Ct. 3228, 49 L.Ed.2d 1222 (1976) (Brennan, J., dissenting).

[8] *Colorado Springs Amusement, supra; Fusari v. Stinberg*, 419 U.S. 379, 95 S.Ct. 533, 42 L.Ed.2d 521 (1975).

[9] In several cases subsequent to Hicks the Court reverted to the looser standard of *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974), which counsels that summary affirmances are not entitled to the same precedential weight or deference extended to rulings accompanied by full written expositions. Thus, in these cases the Court reexamined the merits of 441 U.S. 380, 390 n.9, 99 S.Ct. 1760, 60 L.Ed.2d 297 (1979); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976).

The evolution away from the Hicks standard is detailed in Linzer, The Meaning of Certiorari Denials, 79 Colum.L.Rev. 1227, 1294-1299 (1979).

[10] Justice Brennan, concurring with the per curiam opinion Mandel, succinctly emphasized the import of the decision: it adopted his once dissenting view, it differed significantly from the unquestioning rule in Hicks, and it set forth guidelines for lower courts:

In a dissent from the denial of certiorari in *Colorado Springs Amusements, Ltd. v. Rizzo*, 428 U.S. 913, 96 S.Ct. 3228, 49 L.Ed.2d 1222 (1976), I stated why, in my view, the federal and state courts should give "appropriate, but not necessarily conclusive, weight to our summary disposition," id., at 923, 96 S.Ct. at 3233, rather than be required, as the Court held in Hicks, "to treat our summary dispositions of appeals as conclusive precedents regarding constitutional challenges to like state statutes or ordinances." 428 U.S. at 913, 96 S.Ct. at 3229.

The Court by not relying on our summary affirmance in *Tucker v. Salera*, 424 U.S. 959, 96 S.Ct. 1451, 47 L.Ed.2d 727 (1976), and *Auerbach v. Mandel*, 409 U.S. 808, 93 S.Ct. 55, 34 L.Ed.2d 69 (1972), effectively embraces that view, and vividly exposes the ambiguity inherent in summary dispositions and the nature of the detailed analysis that is essential before a decision can be made whether it is appropriate to accord a particular summary disposition precedential effect. After today, judges of the state and federal systems are on notice that, before deciding a case on the authority of a summary disposition by this Court in another case, they must (a) examine the jurisdictional statement in the earlier case to be certain that the constitutional questions presented were the

same and, if they were, (b) determine that the judgment in fact upon decision of those questions and not even arguably upon some alternative nonconstitutional ground. The judgment should not be interpreted as deciding the constitutional questions unless no other construction of the disposition is plausible. In other words, after today "appropriate, but not necessarily conclusive, weight" is to be given this Court's summary dispositions.

432 U.S. at 179-180, 97 S.Ct. at 2242.

No Justice in any respect questioned Justice Brennan's explanation."

In *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 99 S.Ct. 740 (1979), Mr. Justice Stewart, writing for the Court at Pages 477 and 478 at Footnote 20, summarizes again, the impact of the *Hicks v. Miranda* rule as follows:

"Our summary dismissals are, of course, to be taken as rulings on the merits, *Hicks v. Miranda*, 422 U.S. 332, 343-345 (93 S.Ct. 2281, 2288-2289, 45 L.Ed.2d 223) in the sense that they rejected the "specific challenges presented in the statement of jurisdiction" and left "undisturbed the judgment appealed from." *Mandel v. Bradley*, 432 U.S. 173, 176 (97 S.Ct. 2238, 2240, 53 L.Ed.2d 199). They do not, however, have the same precedential value here as does an opinion of this Court after briefing and oral argument on the merits, *Edelman v. Jordan*, 415 U.S. 651, 670-671 (94 S.Ct. 1347, 1359, 39 L.Ed.2d 662); *Richard v. Ramirez*, 418 U.S. 24, 53 (94 S.Ct. 2655, 72 Ohio Ops.2d 232. A summary dismissal of an appeal represents no more than a view that the judgment appealed from was correct as to those federal questions raised and necessary to the decision. It does not, as we have continued to stress, see, e.g., *Mandel v. Bradley, supra*, necessarily reflect our agreement with the opinion of the court whose

> judgment is appealed. It is not at all unusual for the Court to find it appropriate to give full consideration to a question that has been the subject of previous summary action. *Masachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 309 n 1, 49 L.Ed.2d 520, 96 S.Ct. 2562; *Usery v. Turner Elkhorn Mining Co.* 428 U.S. 1, 14, 49 L.Ed.2d 752, 96 S.Ct. 2882. We do so in this case. The question that Washington asks us to avoid or to resolve on the basis of stare decisis has never received full plenary attention here. It has been the subject of extensive briefing and argument by the parties. It has provoked several, somewhat uncertain, opinions from the Washington courts, see n 27, infra, whose ultimate judgments were the subjects of summary dismissals here."

We recount this history of the eventual evolution away from a strict application of the *Hicks v. Miranda* rule to demonstrate that lower courts are not absolutely precluded from considering the merits of contentions that are similar to issues raised in a summarily affirmed case. In short, under *Mandel* and *Illinois State Board*, the precedential value of a summary disposition by the Supreme Court is to be confined to the exact facts of the case and to the precise question posed in the jurisdictional statement. Furthermore, indications that there have been doctrinal developments since the summary action will relieve a lower court from the duty to adhere to a summary disposition.

This is not to suggest that summary disposition may be disregarded or should have little weight. On the contrary, in those situations where a summary judgment is applicable, it is a binding precedent. The recent Supreme Court explanations indicate, however, that we must ascertain carefully whether a summary affirmance or dismissal does indeed apply in a subsequent case and it is precisely this which the Ninth Circuit has

done subsequent to this Court's consideration of the *Vance* case, after full plenary attention; including extensive briefing and argument by the parties involved. The *stare decisis* value, if any, of the summary disposition in *Art Theatre Guild, Inc., supra,* is non-existent in view of *Vance vs. Universal Amusements Co. Inc., supra.*

It is clear that the District Judge engaged in the kind of inquiry suggested by *Hicks, supra,* and it's progeny and found the *Art Theatre Guild, Inc.,* case not controlling. It is equally clear, that when the U.S. Supreme Court had a chance to consider similar issues in *Vance,* and after briefing and argument, ruled as it did, then under the rationale of *Hicks* and *Mandall v. Bradley, supra. Art Theatre Guild, Inc., supra* has been overuled, if indeed it ever was the law.

Accordingly, here again the issue raised for plenary review by the Appellant Brockett is so insubstantial as to justify summary affirmance of the judgment.

In *Illinois State Board of Education vs. Socialist Workers,* 440 U.S. 173 at 180-181 (1979), Mr. Justice Marshall reviewed the authorities concerning the precedential value of summary dispositions and stated, "We note at the outset the summary affirmances have considerably less precedential value, that an opinion on the merits. See *Edelman v. Jordan,* 415 U.S. 651, 671 (1974) . . . "A summary disposition affirms only the judgment of the Court case cided and may no more be read into our action than was essential to sustain that judgment." "Mr. Justice Marshall, commenting on *Mandel, supra,* concluded that to be foreclosed from future consideration an issue must have been *precisely presented* to the Court and "*necessarily decided*" by the summary dispositon.

CONCLUSION

For the reasons indicated, the judgment of the United States Court of Appeals for the Ninth Circuit in 631 F.2d 136, should be summarily affirmed and costs awarded to Plaintiffs-Appellees.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that three (3) copies of the within Motion to Affirm have been sent by U.S. Mail, postage prepaid to Donald C. Brockett, Appellant, Spokane County Prosecutor, Spokane, Washington 99260. Dated June 15th, 1981.

/S/

Robert Eugene Smith
Attorney for Appellees